FILE COPY

Supreme Court, U. S.
FILED
JAN 16 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1000

DR. DALLAS MOORE,

Petitioner,

versus

STATE HIGHWAY DEPARTMENT OF GEORGIA;
J. DAN WHITE, Sheriff of Seminole County, Georgia,
Individually, etc., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHEVENE BOWERS KING
KING & PHIPPS
POST OFFICE DRAWER 3468
ALBANY, GEORGIA 31706

Attorneys for Petitioner

INDEX

Page

CITATION TO OPINIONS BELOW 1

JURISDICTION 2

THE QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 12

APPENDIX A 1a

APPENDIX B 2a

CITATIONS

Cases:

Adickes v. Kress, 398 U.S. 144, 26 L.Ed.2d 142, 196 (1970) 7, 10, 11

Enochs v. Sisson, 301 F.2d 125, 126 (5th Cir. 1962) 5

Georgia Southern and Florida Railway Co. v. Atlantic Coast Line Railway Co., 373 F.2d 493, 496-498 (5th Cir. 1967) 5

Lynch v. Household Finance Corp., 31 L.Ed.2d 424 (1972) 7

Monroe v. Pope, 365 U.S. 167, 5 L.Ed.2d 492 (1961) .. 7, 8

Statutes:

28 U.S.C. § 1331 ..... 2, 4, 6

28 U.S.C. §§1343(3) and (4) 2, 4, 6, 7

42 U.S.C. §1981 ..... 2, 6

CITATIONS (Continued)

Page

42 U.S.C. §1982 ..... 2, 7

42 U.S.C. §1983 ..... 2, 4, 6, 7, 8

42 U.S.C. §1985 2

42 U.S.C. §1988 ..... 2, 7

28 U.S.C. §2201 ..... 2, 4, 6

Rule:

Rule 56(c), Federal Rules of Civil Procedure . 2, 3, 5, 10

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No.

DR. DALLAS MOORE,
Petitioner,

versus

STATE HIGHWAY DEPARTMENT OF GEORGIA; J. DAN WHITE, Sheriff of Seminole County, Georgia, Individually, etc., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 20, 1972.

CITATION TO OPINIONS BELOW

The order and judgment of the District Court for the Middle District of Georgia sustaining Respondents' motion for summary judgment are printed in Appendix B hereto and are unreported. The affirmance without

opinion of the judgment of the District Court by the Court of Appeals is printed in Appendix A hereto and is unreported.

JURISDICTION

The affirmance without opinion by the Court of Appeals, printed in Appendix A hereto, was entered on October 20, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

THE QUESTIONS PRESENTED

1. May a district court grant summary judgment when no time was ever fixed for the hearing of the motion as provided under Rule 56(c), Federal Rules of Civil Procedure?

2. Did the pleadings before the District Court show on their face that the cause of action asserted in Petitioner's complaint was res judicata?

3. Did the moving party in the District Court carry its burden of showing the absence of any genuine issue of fact?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The statutes involved are: 28 U.S.C. §1331, 28 U.S.C. §§1343(3) and (4), and 42 U.S.C. §§1981, 1982, 1983, 1985 and 1988; 28 U.S.C. 2201.

The constitutional provisions involved are the equal protection and due process clauses of the 14th Amendment and 13th Amendment of the Constitution of the United States.

The Rule involved is Rule 56(c), Federal Rules of Civil Procedure.

STATEMENT

This case arose out of a proceeding in the Superior Court of Seminole County, Georgia, in Civil Action No. 1841-A. It was an *in rem* condemnation proceeding brought by the respondent, State Highway Department of Georgia, on July 28, 1971, against certain lands, improvements and trade fixtures, and the petitioner and Merchants and Farmers Bank as owners and condemnees.

An order of condemnation was entered by the Superior Court of Seminole County, Georgia, on July 28, 1971, wherein the Court set the date of hearing for petitioner to show cause why the condemnor's request for immediate possession should not be granted.

On September 4, 1971, after presentation and argument in the Superior Court, a continuance was granted until September 7, 1971. On September 7, 1971, after hearing, the Superior Court entered its judgment directing the delivery of possession by petitioner to the State Highway Department on September 22, 1971, and directing payment to petitioner by the clerk of the court of the funds on deposit as adequate and just compensation.

The petitioner filed a complaint in the United States District Court for the Middle District of Georgia, Thomasville Division, on September 20, 1971. In his complaint the petitioner alleged, in essence, that the respondents conspired unlawfully to deprive him of his civil rights by abusing the power of condemnation vested in them by State law. The petitioner prayed that the district court enter an order vacating and staying the judgment of the Superior Court of Seminole County, Georgia, entered September 7, 1971. On September 20, 1971, the petitioner also filed a motion for a temporary restraining order and for a preliminary injunction. After a hearing on this motion by the District Court in Columbus, Georgia, on September 21, 1971, this motion was denied.

Respondents answered the petitioner's complaint and denied any unlawful conspiracy or deprivation of his civil rights. On December 10, 1971, the respondents filed a motion for summary judgment. The motion was based upon the defense of res judicata and that they were entitled to a judgment as a matter of law. The district court granted this motion by its order of January 6, 1972. Judgment was entered thereon, January 21, 1972. On appeal, the Court of Appeals, on October 20, 1972, affirmed without opinion.

Jurisdiction in the court of first instance was invoked pursuant to the provisions of 28 U.S.C. 1331 and 28 U.S.C. 1343(3) and (4), 28 U.S.C. 2201 and 42 U.S.C. 1983.

REASONS FOR GRANTING THE WRIT

I

The Courts Below Exceeded Their Jurisdiction In Granting And Affirming Summary Judgment Because No Time Was Ever Fixed For The Hearing Of The Motion As Provided Under Rule 56(c), Federal Rules Of Civil Procedure (FRCP)

Rule 56(c), provides, in part, "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." The Fifth Circuit has interpreted Rule 56(c) as requiring notice to the adverse party and a hearing on a Motion for Summary judgment. *See Georgia Southern And Florida Railway Co. v. Atlantic Coast Line Railroad Co.*, 373 F.2d 493, 496-498 (5th Cir. 1967). *Enochs v. Sisson*, 301 F.2d 125, 126 (5th Cir. 1962). In the instant case, petitioner was never notified of a time fixed for the hearing of respondents' motion for summary judgment; therefore, the order and judgment entered by the district court sustaining the Motion, without proper notice and hearing as required by Rule 56(c), was an abuse of that Court's discretion and exceeded its jurisdiction and thus should not have been affirmed by the Court of Appeals. *See Georgia Southern, supra,* at 497; *Enochs, supra,* at 126. This Court should review the decision below to speak to this derogation of Rule 56(c), FRCP, in the Fifth Circuit.

II

The Courts Below Erred In Granting And Affirming Summary Judgment Because The Pleadings Did Not Show On Their Fact That The Cause Of Action Asserted In Petitioner's Complaint Was Res Judicata.

The respondents moved for summary judgment in the district court "... because the complaint fails to state a claim upon which relief can be granted, in that it appears on the face of the pleadings that the action is res judicata ..." The action which respondents alleged to be res judicata was an in rem condemnation proceeding brought by the State Highway Department of Georgia against "3.202 acres of land; and Dallas Moore and Merchants & Farmers Bank" as owners and condemnees. The action which petitioner's complaint asserted was, however, an entirely different and independent federal cause of action against state officials invoking the original jurisdiction of the district court pursuant to the provisions of 28 U.S.C. 1331 and 28 U.S.C. 1343(3) and (4), 28 U.S.C. 2201, and 42 U.S.C. 1983, which provides a civil action against every person who, under color of state law, custom, or usage, subjects another to the deprivation of any rights, privileges, or immunities secured by the Federal Constitution and laws. The complaint further asserted that the action was brought to redress the deprivation of rights, privileges and immunities secured by the equal protection and due process clauses of the 14th and 13th Amendments of the Constitution of the United States, 42 U.S.C. Sections 1981 (Equal rights under the law),

1982 (Property rights of citizens), 1983 (Civil action for deprivation of rights), 1988 (Proceedings in vindication of civil rights), and other laws of the United States providing for the equal rights of citizens within the United States.

Petitioner was not required to assert this federal right of action in the in rem State Court Condemnation proceedings. *See Monroe v. Pope*, 365 U.S. 167, 5 L.Ed. 2d 492 (1961). Section 1983 authorizes the federal courts to protect rights "secured by the Constitution and laws". *Adickes v. Kress*, 398 U.S. 144, 26 L.Ed.2d 142, 196 (1970). The standards governing the granting of relief under Section 1983 are to be developed by the federal courts in accordance with the purposes of the Statute and as a matter of federal common law. Id. And, in *Lynch v. Household Finance Corp.*, 31 L.Ed.2d 424 (1972), this Court stated, "... the Congress that enacted the predecessor of §§1983 and 1343(3) seems clearly to have intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law." In Georgia, there is no adequate state remedy for the right of action asserted in petitioner's complaint. And, even if there were, it has been held that the federal remedy provided by 42 U.S.C. 1983, "... is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *See Monroe v. Pope*, 365 US 167, 5 L.Ed.2d 492, 503. Thus, that state law, if enforced, could have provided relief is not a bar to a federal court action under Section 1983 for alleged violation of constitutional rights under the equal protection clause of the 14th Amendment.

Petitioner's complaint alleges that the respondents, State Highway Department of Georgia, Hugh Broome, Chairman of the State Highway Department of Georgia, their agents and employees, individually and in their official capacities, conspired unlawfully to deprive appellant of his civil rights because of his race by abusing the power of condemnation vested in them by the laws of the State of Georgia. In *Monroe, supra*, this Court decided that 42 U.S.C. 1983, gives a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position. 365 US 167, 5 L.Ed.2d 492, 497.

That the State of Georgia itself, through its Highway Department and the Department's officials, is a party to the civil rights deprivations of which petitioner complains, underscores that it would have been futile for appellant to ask the State to redress his civil rights deprivations, and points to the reason 42 U.S.C. 1983, provides a supplementary and independent right of action which can not be foreclosed by any failure to assert it in an in rem state court condemnation proceeding. Hence the purposes of 42 U.S.C. 1983, are to: (1) Override certain kinds of state laws; (2) Provide a remedy where state law is inadequate; and (3) Provide a federal remedy though the state remedy, adequate in theory, is not available in practice. *See Monroe, supra*, 5 L.Ed.2d 492, 498.

Thus this Court should review the decision below granting summary judgment, because the pleadings neither show on their face that the cause of action asserted in petitioner's complaint is res judicata nor

the absence of any genuine issue of fact, and petitioner is entitled to a trial on the substantive issues of his complaint.

III

The Courts Below Erred In Granting And Affirming Summary Judgment Because The Moving Party Failed To Carry Its Burden Of Showing The Absence Of Any Genuine Issue Of Fact.

The District Court "... concluded that the Defendant's motion for summary judgment should be sustained for all of the reasons set forth in said motion." The reasons set forth in the motion were, "the complaint fails to state a claim upon which relief can be granted, in that it appears on the face of the pleadings that the action is res judicata ..." Petitioner's verified complaint and affidavit attached thereto contain factual allegations supporting a claim that the respondents therein, their agents and employees, conspired, under color of law, custom, or usage, to deprive appellant of statutory and constitutional rights, privileges, and immunities, by abusing the power of condemnation vested in them by the laws of the State of Georgia. Respondents totally failed to deal with these issues in their motion for summary judgment. Thus petitioner contends the Court below erred in granting said motion because the respondents failed to carry their burden of showing the absence of any genuine issue of fact. Respondents' motion for summary judgment dealt solely with the question of res judicata.

Respondents' motion for summary judgment on the basis of res judicata and the brief in support thereof failed to dispute the allegations in petitioner's verified complaint with affidavit attached that the respondents conspired under color of state law, custom, or usage to deprive him of his civil rights. Petitioner contends that the facts alleged in his verified complaint and affidavit created substantial enough possibility of a conspiracy to allow him to go to trial, especially after appellees failed to offer counter affidavits to show that no conspiracy existed. *See Adickes v. Kress*, 398 U.S. 144, 26 L.Ed.2d 142.

Respondents did not carry their burden of showing no genuine issue of fact. They failed to make any effort to foreclose the possibility that there was a conspiracy to abuse the power of condemnation vested in them by the laws of the State of Georgia. *See Adickes, supra*, 26 L.Ed.2d 142, 154. None of the respondents submitted an affidavit to foreclose the possibility he participated in the alleged conspiracy. And "[b]ecause [o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion," respondents' failure to show that there was no conspiracy requires reversal. *Adickes, supra*, 26 L.Ed.2d 142, 155.

When respondents made their motion for summary judgment, it was not incumbent on petitioner to come forward with any additional affidavits asserting a conspiracy because, under Rule 56(c), the burden was on the moving party to show initially the absence of a

genuine issue concerning any material fact. *Adickes, supra,* 26 L.Ed. 142, 155. And because respondents did not submit any evidence in support of their motion to establish initially the absence of a genuine issue, the district court should have denied the motion "even if no opposing evidentiary matter [was] presented." *Adickes, supra,* 26 L.Ed.2d 142, 155.

After respondents did not, minimally, attempt to meet their initial burden of establishing the absence of the facts alleged to create a conspiracy, petitioner was not required to come forward with any suitable opposing affidavits, *Adickes, supra,* 26 L.Ed.2d 142, 155-156. Only after respondents had met their initial burden of showing that the facts upon which petitioner relied to support his allegation of conspiracy were not susceptible of the interpretation which petitioner sought to give them, would he have been required to do more than simply rely on the contrary allegations in his verified complaint and affidavit. *Adickes, supra,* 26 L.Ed.2d 142, 156. If the party moving for summary judgment fails to show that he is entitled to judgment under established principles, he is not entitled to judgment; and no defense to an insufficient showing is required. *See Adickes, supra,* 26 L.Ed.2d 142, 156. The Courts below erred in granting summary judgment because the moving party failed to carry its burden of showing the absence of any genuine issue of fact, and petitioner is entitled to trial on the substantive issues of his complaint.

CONCLUSION

For the reasons stated herein, it is imperative that this Court review the decision below.

CHEVENE BOWERS KING
Counsel for Petitioner

Of Counsel:

KING & PHIPPS
January — 1973

CERTIFICATE OF SERVICE

I, Chevene Bowers King, counsel for Petitioner, Dr. Dallas Moore, do hereby certify that I have this day served copies of the foregoing petition for a writ of certiorari upon the following counsel for the parties, at the addresses shown, under cover of sufficient postage to insure first class delivery: Julian Webb, Deputy Assistant Attorney General, Box 277, Donalsonville, Georgia 31745 and Arthur K. Bolton, Attorney General, 132 Judicial Building, Atlanta, Georgia 30334.

This ____ day of January, 1973.

Chevene Bowers King
Counsel for Petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1501

DR. DALLAS MOORE,
Plaintiff-Appellant,

versus

STATE HIGHWAY DEPARTMENT OF GEORGIA, J. DAN WHITE, Sheriff of SEMINOLE COUNTY, GEORGIA, Individually, etc., ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

---

(October 20, 1972)

Before TUTTLE, BELL and AINSWORTH, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

---

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA THOMASVILLE DIVISION

DR. DALLAS MOORE,

Plaintiff,

CIVIL ACTION

versus

No. 945

STATE HIGHWAY DEPARTMENT OF GEORGIA, et al.,

Defendants.

Filed: JAN. 7, 1972

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Defendants in the case above identified have heretofore filed a motion for summary judgment and have filed a brief in support thereof. The Plaintiff has filed no response to said motion nor to the Defendants' brief.

The Court has given consideration to the pleadings and to the motion for summary judgment, and to the brief filed in support thereof, and has concluded that the Defendants' motion for summary judgment should be sustained for all of the reasons set forth in said motion. The Defendants' motion for summary judgment

is, therefore, sustained and counsel for the Defendants will prepare an appropriate form of judgment to be entered pursuant hereto.

IT IS SO ORDERED this 6th day of January, 1972.

J. ROBERT ELLIOTT
UNITED STATES
DISTRICT JUDGE

A true and certified copy.
This January 7th, 1972.

JOHN P. COWART, CLERK
U. S. District Court
Middle District of Georgia
/s/ WILLIAM J. TROWELL
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

DR. DALLAS MOORE,

Plaintiff,

CIVIL ACTION

versus

No. 945

STATE HIGHWAY DEPARTMENT OF GEORGIA, et al.,

Defendants.

Filed: JAN. 24, 1972

JUDGMENT

The issues raised by the Defendants' Motion for Summary Judgment having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the relief sought by Plaintiff be and the same is hereby denied, that his complaint be and the same is hereby dismissed, and that Plaintiff pay the costs of this action.

SO ORDERED this 21 day of January, 1972.

J. ROBERT ELLIOTT
UNITED STATES
DISTRICT JUDGE